Supreme Court, U. S.
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APPENDIX

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 74-1055

W. T. STONE,
Petitioner,

vs.

LLOYD CHARLES POWELL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petition for Certiorari Filed February 22, 1975
Certiorari Granted June 30, 1975

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

June 6, 1968—Conviction by a jury after trial in the Superior Court of San Bernardino County, California of murder in the second degree in violation of California Penal Code section 187.

June 10, 1968—Sentence to the California State Prison for the term prescribed by law (five years to life).

October 7, 1969—Affirmance of the judgment of conviction by the California Court of Appeal, Fourth Appellate District, Division Two (4 Criminal No. 3388).

July 1, 1970—Denial by the California Supreme Court of respondent's petition for writ of habeas corpus.

July 15, 1970—Respondent's petition for writ of habeas corpus filed in the United States District Court for the Northern District of California.

September 17, 1970—Order filed denying petition for writ of habeas corpus.

October 28, 1970—Order filed granting a certificate of probable cause to appeal to the United States Court of Appeals for the Ninth Circuit.

May 2, 1971—Appellant's Opening Brief filed.

June 2, 1971—Appellee's Brief filed.

July 15, 1971—Appeal from order denying petition for writ of habeas corpus dismissed by United States Court of Appeals pursuant to stipulation of counsel.

August 24, 1971—Amended petition for writ of habeas corpus filed in the United States District Court.

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November 1, 1971—Order to Show Cause issued.

January 14, 1972—Return to Order to Show Cause filed.

January 26, 1972—Traverse to the Return to the Order to Show Cause filed.

February 8, 1972—Order filed denying the petition for writ of habeas corpus.

February 22, 1972—Order filed granting certificate of probable cause to appeal.

May 3, 1972—Appellant's Opening Brief filed in the United States Court of Appeals for the Ninth Circuit.

June 2, 1972—Appellee's Brief filed.

February 14, 1973—Submission of cause vacated pending the decision of the United States Supreme Court in *Schneckloth v. Bustamonte,* No. 71-732, *certiorari granted,* 405 U.S. 953 (1972); *decided* 412 U.S. 218 (May 29, 1973).

May 29, 1973—Cause taken under submission.

December 4, 1974—Opinion and judgment filed reversing the judgment of the District Court and remanding to the District Court for further proceedings.

December 30, 1974—Order filed staying issuance of mandate to January 4, 1975, under Rule 41(a) of the Federal Rules of Appellate Procedure.

January 22, 1975—Order filed staying issuance of mandate to February 3, 1975, under Rule 41(a).

January 22, 1975—Order filed denying Respondent's motion for enlargement pending review.

February 4, 1975—Order filed staying issuance of mandate to February 17, 1975, under Rule 41(a).

February 20, 1975—Order filed staying issuance of mandate to February 25, 1975, pursuant to Rule 41(a).

February 22, 1975—Petition for writ of certiorari in the United States Supreme Court docketed.

March 7, 1975—Respondent's motion for leave to proceed *in forma pauperis* filed.

April 2, 1975—Order of Mr. Justice Douglas denying respondent's motion for enlargement pending review filed.

June 30, 1975—United States Supreme Court grants motion of respondent for leave to proceed *in forma pauperis* and the petition for writ of certiorari.

Superior Court of the State of California
for the County of San Bernardino

No. CR-21427

The People of the State of California,
Plaintiff,

vs.

Lloyd Charles Powell,
Defendant.

REPORTER'S TRANSCRIPT

Before Hon. Edward P. Fogg, Judge, Department IV (With Jury) San Bernardino, California, May 29, 31, June 3, 5, 1968

Appearances:

For the Plaintiff:
Kenneth L. Pike, Esq.
Chief Trial Deputy District Attorney
Room 200, Court House
San Bernardino, California

For the Defendant:
Holcomb, Ward & Foley
Attorneys at Law
By: Edward P. Foley, Esq.
505 North Arrowhead Avenue
San Bernardino, California

[194] *Edward R. Lattin,* called as a witness by and in behalf of the People, having been duly sworn, testified as follows:

Direct Examination

By Mr. Pike:

Q. And your business or occupation, sir?

A. Police Officer, City of Henderson.

Q. How long have you been a police officer?

A. Approximately two years.

Q. And directing your attention to February 18, 1968, were you on duty as a police officer for the City of Henderson, Nevada on that date?

A. I was, sir.

Q. On that date at about 10:10 A.M. were you on patrol?

A. Yes, sir.

Q. Were you near the Safeway Store's parking lot?

[195] A. I was.

Q. And did you observe any persons in that vicinity?

A. Yes, sir. I observed two unidentified to this officer Negro male adult subjects.

Q. Now, do you see one of those people here today?

A. I do, the defendant.

Q. After you saw these two subjects what did you observe them to do?

A. As the two subjects appeared to look at my police unit, they quickly turned and started walking in an opposite direction.

Q. Is that the opposite direction from which they had been moving in?

A. Yes, sir.

Q. All right. Now, you were in a marked unit?

A. I was.

Q. And would you describe that, please?

A. It is a 1967 Plymouth Fury II. Primarily black with white doors and two red beacons atop.

Q. Did it have any emblems attached to the door?

A. The shield of the Henderson Police Department on either side.

Q. And how were you dressed on this occasion?

A. In the regulation police uniform of our city.

Q. What is that like? Is it brown or black,

A. It is tan in color. With this particular uniform, I believe it was winter type with black tie.

[196] Q. Now, after you observed these two suspects look toward your vehicle and turn and proceed in an opposite direction, what did you observe them to do next?

A. The suspects appeared to continue to look back toward my vehicle from time to time and walk in a very rapid manner.

Q. What did you then do?

A. I then proceeded to make a U-turn and go back toward the area in which I had witnessed them.

Q. What did they do at that time?

A. They appeared to notice, after I had turned around and again walking in a rapid manner split apart from each other and began walking in opposite directions.

Q. Then, what did you do next?

A. I advised Sgt. Walter Zawrotny via radio communication that I had intended to stop the two subjects and that they had just split apart and that I intended to stop the subject who was heading to the rear of what we identified as the Rascoe Department Store.

Q. Then, what did you do next?

A. Upon coming and approaching to the rear of the subject I honked my horn. He failed to stop at first. I then quickly put the vehicle into the park position and jumped out and asked the subject to halt.

Q. And was he still moving at the time that you honked the horn?

A. He was, sir.

[197] Q. In what manner was he moving?

A. In an evasive manner. He didn't want to turn and confront me.

Mr. Foley: Just a moment. If the Court please, I ask that that be stricken as a conclusion of this witness.

The Court: The motion to strike is granted.

Q. (By Mr. Pike:) The term "evasion" is a conclusion of law. So instead we need to go through what he physically did.

The Court: What did he do?

The Witness: He didn't turn around. He continued to walk ahead in a rapid manner.

Q. (By Mr. Pike): Now, as soon as you stopped your vehicle and jumped out, what if anything did you see?

A. I asked the subject, I believe, in my words I said, "Wait a minute."

Q. All right, and did he then stop?

A. He then stopped and turned around.

Q. Did you go up to him?

A. I did.

Q. What happened then?

A. I asked the subject if he had any identification on his person. He stated that he did not and that it had been recently stolen from him.

Q. Did he give you his name?

A. He did, sir.

Q. What name did he give you?

[198] A. Lloyd Charles Powell.

Q. Then, what did you do next? Did you make any checks on him?

A. I did. I obtained his age which was 21 years. Date of birth the 6th month, I believe, year '47. Pardon me. January 6, 1947, and I ran his name along with his date of birth through a record check at the Henderson Police Department with a negative result.

Q. Did you ask him where he had been staying?

A. I did.

Q. What did he tell you about that?

A. He stated that he had been staying with friends in Las Vegas.

Q. Did you ask him where these people lived?

A. Yes, sir. He was unable to give me a name of a street nor the name of his friends.

The Court: What time was this, sir?

The Witness: I witnessed the subjects at approximately 10:10 A.M. in the morning, Sunday morning.

Q. (By Mr. Pike): What kind of an area was it that you first saw them there, residential, commercial?

A. Commercial area. It was a shopping center.

Q. Were the shops open at that time?

A. They were.

Q. Now, after you asked him for identification and he told you his name only, did you thereafter place under arrest?

[199] A. No, sir. I again questioned him and at the same time about the friends in Las Vegas and asked him where he was en route to which he stated back to Michigan.

Due to the fact that the subject had no real answer as far as where he had been staying nor the friends that he was with nor could give me a reason for being in the Henderson area, I consequently did place him under arrest.

Q. And what did you arrest him on?

A. Under our Vagrancy Ordinance in the City of Henderson, Section H.

Q. Thereafter, did there come a time when you examined his clothing and person?

A. I did, sir. After the arrest I did search the subject. He was standing at the front of the patrol car. I believe the subject was clothed in an orange suit with a black turtle-neck dickie and carrying a brown leather jacket draped across his arm.

Q. Would that be a black leather jacket?

A. I believe it was a brown leather jacket, sir. I am not sure.

Q. Now at this time Officer I show you People's Exhibit No. 7 for Identification and I ask you if you recognize that?

Mr. Foley: If the Court please I think this is now irrelevant. The point, while we are in here, the fruits of what he found is irrelevant to this proceeding. In this proceeding in here right now all we are concerned

[200] about is whether or not the arrest was legal and the search was legal.

The Court: Well, probably right.

Mr. Foley: I just want to protect the record. If I don't object to his testifying about the gun, then I don't want to waive my right to testify (sic) out there.

The Court: You mean your right to cross-examine?

Mr. Foley: I mean my right to object in front of the jury.

As far as this issue in here is concerned before you, I really have no objection as to whether or not he testifies about what he found but ——

The Court: Go ahead.

Mr. Foley: — I assert my right ——

The Court: It is understood that you are reserving the right to object in front of the jury.

Mr. Pike: This will all have to come out in front of the jury again. It seems to me we are at the point of deciding whether or not the arrest is lawful or unlawful and I can proceed with questioning but it will have to be done again.

Mr. Foley: Not out there, counsel, if he decides that the arrest is unlawful.

The Court: Do you have some other questions?

Mr. Pike: Only now to go into the identification of the gun, your Honor. It will have to come out in front [201] of the jury.

Mr. Foley: May I cross-examine him, then, about the ——

The Court: Yes.

Cross-Examination

By Mr. Foley:

Q. Officer, this was a Sunday morning, right?

A. Yes, sir.

Q. And about 10:00 o'clock in the morning when you first observed the two Negroes, is that right?

A. Yes, sir.

Q. And were they in the parking lot of this shopping center?

A. They were.

Q. Were there other cars in the parking lot? Were there cars in the parking lot?

A. There were cars in the parking lot.

Q. Were other people in the parking lot?

A. Yes, sir.

Q. And some of the stores were open for business, is that right?

A. Some of the stores were open being Sunday morning, yes, sir.

Q. And, all right, and then you decided it was best to check these two persons for two reasons, did you not: One, due to the fact that they were unknown to you and number two, due to their suspicious actions when they saw the police [202] unit?

A. That is correct.

Q. All right. Are you suspicious, sir, of all unknown persons that you see at 10:00 o'clock on a Sunday morning?

A. No, sir.

Q. How big a community is Henderson?

A. It is approximately 17,000 population, I believe.

Q. Are there Negroes that live in Henderson?

A. Yes, sir.

Q. I take it that you don't personally know all of the persons, then, who live in Henderson?

A. No, sir.

Q. And when you first saw these two persons you didn't know whether they lived in Henderson or didn't live in Henderson, is that right?

A. No, sir.

Q. Well, I had better rephrase that so we ——

Did you know whether or not these two persons lived in Henderson?

A. No, sir.

Q. And how far is Henderson from Las Vegas?

A. Approximately, a guess, eight miles.

Q. Pardon me. Did you say eight miles?

A. Yes, sir.

Q. And is it north, south, east or west of Las Vegas?

A. It is south.

[203] Q. And is it on any highway, sir?

A. Yes, sir.

Q. Which one?

A. US 93, Alternate Route 95 and 466, Boulder Highway.

Q. Could one of those routes take you to, say, Michigan?

A. Yes, sir.

Q. Now, you asked the defendant where he had come from, right?

A. That is correct.

Q. And he told you he came from Las Vegas, is that right?

A. That is correct.

Q. And you asked, eventually, where he was going to, is that right?

A. I did.

Q. And he told you he was going to go to Michigan, is that right?

A. That is correct.

Q. And you had no reason to doubt that he was going to Michigan, did you?

A. No, sir.

Q. Did you ask him whether or not he had any money on him?

A. I don't believe I did, no, sir.

Q. Now, there's some sort of an access road in this shopping center?

A. Yes, sir, there is.

Q. And where is that located in the shopping center?

A. It is known as the frontage road. It is located directly [204] parallel to the Boulder Highway in the area in front of the Safeway Shopping Center.

Q. Now, when you saw those two persons were they on the access road or were they in the shopping center?

A. They were within the parking lot of the shopping center.

Q. Now, in your report didn't you write "At this time I witnessed the first subject to be walking to the area of the Rascoe Department Store located within the parking lot while the second subject continued walking in a southerly direction down the access road adjacent to the Safeway Store."

A. That is correct.

Q. Now, when you say "the second person continued walking in a southerly direction down the access road" do you mean that he had been walking in a southerly direction on the access road when you first saw him?

A. No, sir.

Q. Now, after you stopped the defendant and was talking to him, you asked him his name, is that right?

A. That is correct.

Q. His name — he gave you the name of Lloyd Charles Powell, right?

A. Yes, sir.

Q. You asked him his date of birth, right?

A. That is correct.

Q. And he gave you the date of January 6th, 1947?

[205] A. Yes, sir.

Q. And did he appear to you at that time to be about a twenty-one year old person?

A. Yes, sir.

Q. And you had no reason to believe that he was lying about the date of birth?

A. Possibly.

Q. All right, from his appearance?

A. No, sir, just because of my suspicious nature.

Q. All right. You do have a suspicious nature don't you, Officer?

A. Yes, sir.

Q. And when he told you his name was Lloyd Charles Powell, you had no reason to believe that he was lying to you, did you, except for your suspicious nature?

A. Correct.

Q. And did you check with your headquarters to find out if there were any wants on a Lloyd Charles Powell, didn't you?

A. On the name, yes, sir.

Q. And they reported back to you before you made the arrest, isn't that right?

A. That is correct.

Q. And in reporting back to you they told you there were no wants that they knew of for this boy, for a Lloyd Charles Powell?

A. Yes, sir, for the name.

[206] Q. All right, and have you told us, sir, all the reasons you can think of upon which you based this arrest?

A. I believe I related all the facts to Mr. Pike.

Q. All right.

The Court: Now, not what you related to him but have you told the Court everything?

The Witness: Yes, sir.

Q. (By Mr. Foley): And when you just said you related all to Mr. Pike you meant in answer to Mr. Pike's questions in this courtroom?

A. Yes, sir, during my testimony.

Q. All right. What does the Vagrancy Statute in Nevada provide, the one on which you arrested him?

Mr. Pike: At this time, your Honor, the Officer has a certified copy of the Vagrancy Ordinance with him.

Mr. Foley: May I look at it?

Mr. Pike: I would suggest that rather than have him testify as to legal conclusions, we will offer this into evidence.

Mr. Foley: May I see it first, Counsel?

Mr. Pike: Certainly.

Q. (By Mr. Foley): At anytime did Mr. Powell refuse to answer any questions?

A. He refused to answer my questions directly.

Q. All right. Now, how many questions did he refuse to answer directly?

[207] A. Three.

Q. All right, what were the three questions and what were the answers that he gave?

A. When asked how long he had been staying in the Vegas area.

Q. What if anything did he say?

A. I believe he stated "For a while". I will have to refresh my memory. I am not sure whether he told me the exact time or not, but he did not give me the amount of days which he had been in the area which I wanted and requested.

Q. Do you have something by which you can refresh your memory?

A. Yes, sir, I have my handwritten copy of my arrest report.

Yes, sir, he did state "For the past few days" was the actual statement that he made to me.

Q. All right. What was the next question that you asked him and you got an indirect answer?

A. I asked him with whom he had been staying and residing.

Q. What was his answer?

A. He had no names for me.

Q. What was his answer?

A. He didn't answer. He shrugged his shoulders.

Q. Did he say "With some friends"?

A. With some friends, yes, sir. This was later after I had asked him as to the residence.

Q. What other questions did he——

A. I asked him where the residence was. He stated that he was—he didn't know the address. He was just staying with [208] some friends in Vegas. That was his actual statement.

Q. Now, did you, sir, arrest him for violation of Subsection H of the Vagrancy Statute?

A. Yes, sir.

Q. And that provides "Loiterers or wanderers upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when asked by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification."

Is that the subsection that you arrested him on?

A. It is.

Mr. Foley: I have no further questions.

Mr. Pike: I have a few other questions, then.

Redirect Examination

By Mr. Pike:

Q. With regard to the direction, if he had been in Las Vegas, would he, in order to reach Michigan, go south to Henderson, Nevada?

A. No, sir.

Q. Which direction would he have gone?

A. Easterly.

Q. So, if he had been in Las Vegas, then, to be in Henderson en route to Michigan was it reasonable or unreasonable?

[209] A. It was unreasonable in my opinion.

Q. Now, after you stopped the defendant did you search his person?

A. After the arrest?

Q. Yes.

A. Yes.

Q. At this time I show you People's Exhibit No. 7 and ask you if you recognize it?

A. I do.

Q. Where was it when you first observed it?

A. Within the jacket pocket of the brown coat which Mr. Powell possessed.

Q. And did you take possession of that weapon?

A. I did.

Q. Did you place any identifying marks on it?

A. Yes, sir, I did.

Q. And where are they?

A. On the base of the wooden grips. Also upon the metal of the gun itself.

Q. And does the gun now appear to be in substantially the same condition as it was when you——

A. It certainly is.

Q. You didn't do anything to modify it?

A. No, sir.

Q. Do you happen to recall the condition of the chamber as to live or expended shells?

[210] A. Yes, sir. There were six expended .38 Smith and Wesson cartridges within the chamber within the cylinder.

Q. By "expended" you mean they had been discharged, then?

A. Yes, sir.

Mr. Pike: At this time, your Honor, I respectfully submit that we go back out before the jury and present this information and I think the officer——

Mr. Foley: Wait a moment, Counsel. I have a couple of questions.

Recross-Examination

By Mr. Foley:

Q. This search that you made of this defendant was a search after the arrest, right?

A. Following the vagrancy arrest.

Q. Right, and you made that search incidental to that arrest, right?

A. Yes, sir.

Mr. Foley: Thank you. I have no further questions.

Mr. Pike: This will be People's Exhibit No. 12, I believe?

The Clerk: Yes.

The Court: It may be marked.

Mr. Pike: May it be received in evidence?

Mr. Foley: Not numbered for the jury consideration. [211] This should be marked separately for your consideration.

Mr. Pike: It should be in evidence before the Court.

Mr. Foley: I agree with that.

The Court: It is received in evidence for the Court's information, then, as——

Mr. Pike: Not to go to the jury, then.

The Court: With the understanding that it is not to be exhibited to the jury. It will be People's Exhibit ——

The Clerk: Twelve.

The Court: It may be admitted.

Anything else?

Mr. Foley: No but I would like to be heard after counsel has made his motion.

Mr. Pike: I think that now the next thing to do is, you have made an objection.

The Court: Your objection.

Mr. Foley: Yes. All right. I have made an objection, your Honor, on the basis that this search was incidental to an illegal or an unlawful arrest. A police officer who makes an arrest—strike that—counsel, will you stipulate for this proceeding that the officer did not have a warrant of arrest or search warrant?

Mr. Pike: Yes, sir.

Mr. Foley: I will so stipulate. The officer may make an arrest of a defendant for a misdemeanor committed **[212]** in his presence, make that arrest without a warrant if he has probable cause for believing that the defendant is committing that particular crime.

Now, at 10:00 o'clock in the morning on a Sunday morning seeing two colored persons in a parking lot at Henderson, Nevada is not grounds in and of itself for an arrest. At 10:00 o'clock in the morning, watching the defendant and his friend act suspiciously when they, apparently, spot his car might be grounds for stopping them, checking their identification and frisking them; to stop and frisk route. So, then, the officer, however, because of his admittedly own suspicious nature was suspicious that the defendant gave the wrong answer when he was asked to identify himself and gave the wrong date of birth.

That section says that you are guilty of a crime if you loiter and wander about from place to place and you refuse to identify yourself and, then, it goes into public safety and so forth.

I submit, your honor, that this was an illegal arrest and the search incidental to it was illegal.

Mr. Pike: I would like to point out, your Honor, in that regard that the surrounding circumstances that call for an officer checking into this as is indicated in Subsection H are clearly met.

The two Negroes were unknown to the officer in the **[213]** community. They observed his vehicle, apparently, and therefore made a complete about-face in the direction of travel; looked back over their shoulders and, then, the officer made a U-turn. They split and went in different directions but thereafter that when he talked to the defendant he questioned him. He was not able to give him his reasons for being there. Instead he said he was going to Michigan and he was in the wrong line of travel if he was in Las Vegas to be heading for Michigan.

In addition to which he was unable to give him any identification as to these alleged friends and just gives him no names on that, no address at all. In all of these things, your Honor, I submit that he was a wanderer within the meaning of the ordinance. The ordinance is the law of Henderson, Nevada, and I think we should give it full credit.

Mr. Foley: He did not refuse to identify himself.

Mr. Pike: He did refuse to tell his business and what business he did tell was obviously false.

The Court: The objection is overruled.

[214] (The following proceedings were taken and had in open court, in the presence of the jury:)

The Court: The witness has been sworn in chambers. You may proceed.

Mr. Pike: Yes. Thank you, your Honor.

Edward R. Lattin, called as a witness by and on behalf of the plaintiff, having been previously sworn, testified as follows:

Direct Examination

By Mr. Pike:

Q. Some of this will have to be a duplication because the jury hasn't heard it. What is your name, sir?

A. Edward R. Lattin.

Q. What is your business or occupation?

A. Police officer, City of Henderson, Nevada.

Q. How long have you been so employed?

A. Approximately two years.

Q. Directing your attention to February 18, 1968, were you on duty as a police officer for the City of Henderson, Nevada, on the morning of that date?

A. I was.

Q. And on that date were you in a patrol unit?

A. Yes, sir.

Q. What kind? Woud you describe that for the jury?

[215] A. It was a 1967 Plymouth Fury II, black in color, with white doors.

Q. Did it have any official police markings on it?

A. Yes, it did. It had badges on either side, decals.

Q. And those are the City of Henderson Police Department?

A. Yes, sir.

Q. Did it also have any particular police equipment, that is, mechanical devices?

A. Yes, sir. It had two Federal rotating beacons on the top of the vehicle.

Q. Were you in uniform at that time?

A. I was.

Q. What color is your official uniform?

A. Tan in color with black tie, gold stripes.

Q. Now, at about 10:10 in the morning of February 18 did you have occasion to be in the area of the Safeway Store's parking lot?

A. Yes, sir.

Q. And while in that area did you see two persons?

A. I did.

Q. And when you saw them, what, if anything, did you observe about them?

A. Both subjects appeared to be looking toward the direction of my police unit. When they observed my unit, they quickly turned.

Q. Did they then go in an opposite direction to that they had **[216]** been going in?

A. They did.

Q. Did they look back at all?

Mr. Foley: Objection. Leading and suggestive.

Q. What did they do next? Withdraw the question. What did they do next?

A. They appeared to continue from time to time to glance back at my vehicle.

Q. What race were these two individuals?

A. Negro.

Q. Do you see either one of them in court today?

A. I do.

Q. Would you point him out to the jury?

A. The defendant, Mr. Lloyd Charles Powell.

Q. Now, after you observed them to reverse their direction of travel and look back over their shoulder, what, if anything, did you observe next?

A. The subjects appeared to be walking in a rather rapid manner away from the area.

Q. Did you then change your direction?

A. I did, sir. I executed a U-turn.

Q. And did you return back in the direction of those two people?

A. I did.

Q. What did you observe then?

A. The subjects appeared to look back, and when they noticed **[217]** my vehicle heading toward their direction, they split apart from each other and began walking in the opposite direction.

Q. Did they move fast or slow at that time?

A. Again in a rapid manner.

Q. And did they look back?

A. They did.

Q. What did you do next?

A. I notified my patrol sergeant, Sgt. Zawrotny, that I intended to stop the subjects and asked for him to come and assist me.

Q. And did you then follow one of the subjects?

A. I did.

Q. What occurred?

A. I followed Mr. Powell, the defendant, towards the area to the rear of the Roscoe Department Store. He was walking rather rapidly, and as I followed him, I honked my horn when I was directly behind him and he failed to halt.

Q. Would you describe the area where you first observed these two men?

A. It was within the parking lot area of the Safeway Store.

Q. And where is that with relation to any major highways?

A. The Safeway Store shopping center, which incorporates several businesses, is parallel to the Boulder Highway that runs through the City of Henderson.

Q. Now, where is Henderson with reference to Las Vegas?

[218] A. Just south of Las Vegas.

Q. About how far?

A. I'd guess approximately eight miles.

Q. Now, when you observed Mr. Powell walk to the area of the rear of the Roscoe Department Store, what direction would that be with reference to the through highway?

A. Would you rephrase the question?

Q. Yes. In walking toward the Roscoe Department Store, would he have been walking toward or away from or in what relationship would he have been walking with relation to the through highway?

A. He would have been walking southeast away from the through highway.

Q. Which direction did the other person go in?

A. He at first turned and went in a southwest direction, and upon reaching the access road to the front of the parking lot, he walked south parallel to the highway.

Q. What highway is parallel to this shopping center?

A. U. S. 93, Alternate Routes 95 and 466, the Boulder Highway.

Q. Now, after you blew your horn behind Mr. Powell, what occurred next?

A. The subject continued walking at a rapid manner.

Q. What did you do then?

A. I then directed my police vehicle approximately a few feet further and put it into parking position and alighted from my vehicle.

[219] Q. What, if anything, did you say or do?

A. I asked the subject to stop.

Q. Did he stop?

A. He did.

Q. All right. Did you then go up and question him?

A. Yes, sir, I did.

Q. And did you run a record check on him?

A. Yes, sir, I ran a record check on the name that was given me.

Q. What name did he give you?

A. Lloyd Charles Powell.

Q. What birth date did he give you?

A. January 6, 1947.

Q. Did you ask him where he was going?

A. I did.

Q. What did he tell you?

A. Michigan.

Q. Did you ask him where he had been?

A. Yes, sir, I did.

Q. What did he tell you about that?

A. He stated that he had been in the Las Vegas area.

Q. Now, from California would one go from Las Vegas to Henderson in order to get to Michigan?

Mr. Foley: I'll object, your Honor, as calling for a conclusion of this witness as to what one person would do or would not do under certain circumstances.

[220] Mr. Pike: Let me rephrase the question.

Mr. Foley: All right.

Mr. Pike: The Court is already aware of the problem here.

Q. Is Henderson located in a direct route or in a route to Michigan from Los Angeles and through Las Vegas?

A. No, sir.

Q. Would you reach Henderson first or Las Vegas first when you go from California, Los Angeles or San Bernardino, to Detroit?

A. Las Vegas.

Q. Now, did you attempt to determine where Mr. Powell had been staying in Las Vegas?

A. I did.

Q. What did he tell you?

A. He stated he had been in the Las Vegas area for the past several days.

Q. Did you ask him the names of the people he had been staying with?

A. I did.

Q. What did he tell you?

A. He had no answer.

Q. Did you ask him where the location was that he had been staying?

A. I did. I asked him the residence in which he had been staying. He stated, "Just with friends in Las Vegas."

[221] Q. Did you ask him if he had any means of identification?

A. I did.

Q. What, if anything, did he present or tell you about that?

A. He stated he had no identification; that it had been recently stolen from him.

Q. Officer, I've got a question here in mind. If you leave San Bernardino and you go to Detroit, en route do you go through Henderson and Las Vegas?

A. No, sir.

Q. You don't?

A. No. You would be traveling on Interstate 15, which the last town before Las Vegas is Sloan, Nevada, and then in order to reach Henderson, you would have to take a cut-off.

Q. And go south?

A. Yes, sir.

Q. Would you be south of Las Vegas?

A. Yes, sir.

Q. Did there come a time then when you placed the defendant under arrest?

A. I did.

Q. And did you search him?

A. Incident to the arrest.

Q. At this time, Officer, I show you People's Exhibit No. 7 for identification. Do you recognize People's Exhibit 7?

A. I do.

Q. Where was that when you first observed it?

[222] A. Located within the jacket pocket that the defendant possessed.

Q. Now, did you place your initials or any identifying marks on People's Exhibit 7?

A. Yes, sir, on the base of the wooden grips and again in the metal of the gun.

Q. Is the weapon, People's Exhibit 7, now in substantially the same condition that is was in at the time that you took it from Mr. Powell?

A. Yes, sir.

Q. What was the condition of the cylinder as to whether or not there were any shells in it when you obtained the gun?

A. The cylinder contained six empty .38 caliber Smith & Wesson short cartridges.

Q. You mean they had been discharged or fired?

A. That's correct.

Q. Now, did you take the defendant to the police station?

A. I did.

Q. And when you arrived there, did he say anything about a different name?

A. He did, sir.

Q. What did he tell you then?

A. He stated that his name wasn't in essence Lloyd Charles Powell but it was actually Frank Jones.

Q. Did he tell you anything else about his identity at that time?

[223] A. He refused his age or his place of birth. I believe he refused everything except his name during the booking procedure.

Mr. Pike: I have no further questions. You may cross-examine.

Cross-Examination

By Mr. Foley:

Q. Officer, this was about 10:00 o'clock in the morning when you first saw the defendant, right?

A. Yes, sir.

Q. You saw him on a parking lot of a big shopping center, right?

A. At approximately 10:10 a.m.

Q. And the stores were open for business, weren't they?

A. A few stores.

Q. Safeway was open for business, wasn't it?

A. It was.

Q. And there were automobiles in the parking lot, weren't there?

A. There were.

Q. There were other people in the parking lot?

A. That's correct.

Q. And when you saw these two Negroes, you didn't recognize them, did you?

A. No, sir.

Q. And that was one of the reasons why you decided to check **[224]** them out, isn't that a fact, Officer?

A. Yes, sir. I wanted them to account for their presence.

Q. All right. So when you did arrest the defendant, you arrested him on a charge of vagrancy, isn't that right?

A. That's correct.

Q. And when you did ask him his name, he told you at the—right before the arrest, he told you his name was Lloyd Charles Powell, right?

A. That's the—That was the name he presented me.

Q. All right. And you asked him when he was born?

A. Correct, his date of birth.

Q. And he gave you January 6, 1947, right?

A. Yes, sir.

Mr. Foley: Thank you. I have no further questions.

Mr. Pike: I have no other questions. May the officer by excused, your Honor?

Mr. Foley: No objection.
Mr. Pike: He is here from Henderson, Nevada.
The Court: You are excused, sir.
Mr. Pike: Thank you very much.
(Witness excused.)

[Opinion of the California Court of Appeal, Fourth Appellate District, Division Two, 4 Criminal No. 3388, filed October 7, 1969, affirming the judgment of conviction, which is printed as Appendix C of the Petition for Writ of Centiorari filed on February 22, 1975, in W.T. Stone, Warden v. Lloyd Charles Powell, USSC No. 74-1055, omitted in printing.]

United States District Court
Northern District of California

Case No. C-70 1497 LHB

Persons in State Custody

LLOYD CHARLES POWELL

vs.

W. T. STONE, Warden

[Filed August 24, 1971]

FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS

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1. Place of detention: California Training Facility, Soledad, California.
2. Name and location of court which imposed sentence: Superior Court, County of San Bernardino, California.
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
   (a) Crim. No. 21427
4. The date upon which sentence was imposed and the terms of the sentence:
   (a) June 10, 1968—Murder in the Second Degree.

5. Check whether a finding of guilty as made:
   (a) ..... after a plea of guilty.
   (b) ..... after a plea of not guilty.
   (c) ..... after a plea of nolo contendere.
6. If you were found guilty after a plea of not guilty, check whether that finding was made by:
   (a) xx a jury.
   (b) ..... a judge without a jury.
7. Did you appeal from the judgment of conviction or the imposition of the sentence? Yes.
8. If you answered "yes" to (7), list
   (a) the name of each court to which you appealed:
      i. Court of Appeal, Fourth District, Second Division.
   (b) the result in each such court to which you appealed:
      i. Affirmed.
   (c) the date of each such result:
      i. October 7, 1969.
   (d) if known, citations of any written opinion or orders entered pursuant to such results:
      i. 4/Crim. 388 (unpublished opinion)
9. If you answered "no" to (7), state your reasons for not so appealing:
   (a)
   (b)
   (c)

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
   (a) See attached memorandum of points and authorities, which is incorporated by this reference.
11. State consisely and in the same order the facts which support each of the grounds set out in (10):
   (a) See attached memorandum of Points and Authorities, which is attached and incorporated by this reference.
12. Prior to this petition have you filed with respect to this conviction:
   (a) any petitions in State or Federal courts for habeas corpus or coram nobis? Yes.
   (b) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No.
   (c) any other petitions, motions or applications in this or any other court? Yes.
13. If you answered "yes" to any part of (12) list with respect to each petition, motion or application:
   (a) the specific nature thereof:
      i. Writ of Habeas Corpus.
      ii. .....
      iii. Writ of Habeas Corpus.
      iv. .....

(b) The name and location of the court in which each was filed:

i. California Supreme Court.

ii. .....

iii. United States District Court, Northern District of Calif.

iv. .....

(c) the disposition thereof:

i. Denied.

ii. .....

iii. Denied.

iv. .....

(d) the date of such disposition:

i. July 1, 1970

ii. .....

iii. September 17, 1970

iv. .....

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. None.

ii. .....

iii. Civil No. 70-1497, Docket Entry #2.

iv. .....

14. Has any ground set forth in (10) been previously presented to this or any other court, state or

federal, in any petition, motion, or application which you have filed? Yes.

15. If you answered "yes" to (14), identify:

(a) which grounds have been previously presented:

i. All of them.

(b) the proceedings in which each ground was raised:

i. Appeal—Court of Appeal, Fourth District, Second Division.

ii. Writ of Habeas Corpus—California Supreme Court.

iii. Writ of Habeas Corpus—Federal District Court, Northern District, of California (Judge Levin).

16. If any ground set forth in (10) has not previously been presented to any court, state or federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) n/a

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? yes

(b) your trial, if any? yes

(c) your sentencing? yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes.

(e). preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes.

18. If you answered "yes" to one or more parts of (17) list:

(a) the name and address of each attorney who represented you:

i. Edward P. Foley, 505 N. Arrowhead Avenue, San Bernardino, California.

ii. Richard R. Beswick, Suite 402, 323 West Court St., San Bernardino, California.

iii. Robert W. Peterson, University of Santa Clara Law School, Santa Clara, California (Appeal from denial by Federal District Court)

(b) the proceedings at which each such attorney represented you:

i. Trial.

ii. Appeal from conviction.

iii. Appeal from Denial of Writ of Habeas Corpus by Federal District Court.

19. If you are seeking leave to proceed *in forma pauperis*, have you completed the sworn affidavit setting forth the required information (see instructions, page 2 of this form)? Yes.

.....

Signature of Petitioner

State of California
County of Monterey
ss.

Lloyd C. Powell, being first sworn under oath, presents that he has subscribed to the foregoing petition and does state that the information therein is true and correct to the best of his knowledge and belief.

.....

Signature of Affiant

Subscribed and Sworn to before me this ..... day of ....., ...

(month) (year)

.....

Notary Public

My commision expires .....

(month, day, year)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS*

Statement of the Case

Petitioner, Lloyd Charles Powell, was charged by information filed by the District Attorney of the County of San Bernardino, State of California, with the crime of Murder, in violation of California Penal Code Section 187, the overt act alleged being that the appellant on or about the 18th day of February, 1968, in the County of San Bernardino, State of California, did unlawfully murder Mary P. Parsons, a human being.

On the 8th day of March, 1968, the District Attorney of the County of San Bernardino, State of California, filed the information in the Superior Court of the State of California for the County of San Bernardino, at which time the Petitioner pleaded not guilty and requested trial by jury. The jury found the Petitioner guilty as charged the information.

Petitioner exhausted available state remedies by appealing to the Court of Appeal for the Fourth Appellate District, State of California, and by subsequently filing for a Writ of Habeas Corpus in the Supreme Court for the State of California. Petitioner suffered adverse rulings in both proceedings and then filed for a Writ of Habeas Corpus in the

*Misspellings in original.

United States District Court for the Northern District of California. (Civil No. 70-1497 GSL). The Petition was denied and a certificate of probable cause was issued. Petitioner appealed and on July 15, 1971, the appeal was dismissed pursuant to stipulation and the case was remanded to the District Court with leave to file an amended Petition. Accordingly, the present Petition was filed.

Statement of the Issue

Petitioner contends that his conviction was in part the result of the introduction of illegally obtained evidence, in that fruits of an arrest made in violation of the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States were introduced in evidence against him.

Statement of the Facts

The incident in question occurred on February 18, 1968, at the Bonanza Liquor Store, 1052 W. 5th Street, San Bernardino, California (RT 8). The time of the occurrence was shortly after 12 o'clock midnight.

On the late evening of February 17, 1968, Mr. John Chaney, Mr. Lester Mercer, Mr. Fred Buckley, and Petitioner Lloyd Powell were in a cocktail lounge when they decided to go to a liquor store and purchase some liquor (RT 132). Mr. Mercer purchased some cigarettes and beer, and attempted to give Mr. Buckley some change to buy a drink (RT 67, 133). At that time, Mrs. Parsons, the clerk behind the counter, leaned over and asked Petitioner if he was

going to pay for the wine (RT 68). By this time, Mr. Parsons came from the back room to confront the Petitioner. The Petitioner responded, "What wine? I have no wine.", whereupon Mr. Parsons grabbed his jacket stating, "You're going to pay for the wine that you have under your coat or what are you going to do?" (RT 68) Petitioner struck or pushed Mr. Parsons (RT 12).

Mr. Parsons asked his wife for the gun that was kept at the counter (RT 12, 69). There is conflicting testimony by the state's two witnesses, Mr. Parsons and Mr. Buckley as to whether the Petitioner left the store immediately after the scuffle. Mr. Parsons claims when he next looked up with the gun in his hand the Petitioner was no longer in the store. He did not see him leave (RT 12, 13). On the other hand, Mr. Buckley testified that he never saw the Petitioner leave the store (RT 70).

Mr. Parsons pointed the gun at the Petitioner and cocked it (RT 16, 70). Parsons claimed that he purposefully shot out of the line of fire, and then dropped the gun when the Petitioner kept advancing (RT 16, 17). Mr. Buckley testified that Petitioner grabbed his arm and the gun discharged (RT 70). According to Buckley, the gun was never dropped, but rather a struggle over the gun ensued (RT 71). In any event, there were discharges wounding Mr. and Mrs. Parsons. At one point Mr. Parsons got another gun and shot Mr. Buckley in the arm. (RT 22, 87). Buckley ran out of the store after being shot leaving only Mr. Parsons and his wife in the store.

On the following day, Officer Lattin of the Henderson, Nevada, Police Department, observed the Petitioner and Mr. Chaney as they looked in the direction of his police unit. The two men then turned and walked in the opposite direction. They walked in a rapid manner, and thereafter split apart. Lattin pulled up behind the Petitioner, honked his horn and thereafter jumped out and ordered him to stop. The Petitioner did not put forth any identification at the request of Lattin, explaining that it had been stolen from him earlier. The Petitioner, however, did give him his true name—Lloyd Charles Powell—and his birthdate. Lattin ran a namecheck through the Henderson Police Department with a negative result (RT 198). The Petitioner told the officer that he had been staying with friends in Las Vegas. All of the above events occurred in a commercial area at approximately 10:10 A.M. on Sunday morning, a time when there were people in the shopping center, and the stores were open for business (RT 158). Lattin arrested the Petitioner under Henderson, Nevada's Vagrancy Ordinance because he could not give the exact number of days that he spent in Las Vegas, and because Petitioner could not give the name and address of his friends in Las Vegas (RT 207). After the arrest, Petitioner was searched and the alleged murder weapon was found in his coat pocket. At the station he told the officer his name was not Lloyd Charles Powell (RT 222). Petitioner was held and subsequently transferred to the County of San Bernardino, California, where he was detained pending trial. The circumstances of his arrest, the gun, and

Petitioner's attempt to change his name were all introduced at the trial (RT 214-224).

Argument

A. *The Henderson, Nevada, Vagrancy Ordinance is unconstitutionally vague in that it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden.*

The ordinance provides:

> Every person is a vagrant who:
> Loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when asked by a police officer to do so if surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification.

Petitioner was arrested for violation of this ordinance, and the search pursuant to that arrest uncovered the gun which was later introduced at the trial as the murder weapon.

It is elementary that the government cannot proscribe as criminal conduct that it cannot define with sufficient particularity to give a man of ordinary intelligence fair notice of what is forbidden. In the recent case of *Palmer v. City of Euclid,* 39 U.S.L.W. 4612 (May 24, 1971) the United States Supreme Court applied the above test to the phrase "without visible or lawful business" and unanimously held that, as applied to someone discharging a lady (whose name he did not know) from an automobile late at

night under somewhat suspicious circumstances, the language was constitutionally infirm. If this be so, then certainly the phrase "without apparent reason or business" (a broader and more vague injunction than the Euclid Ordinance) is unconstitutional when used to arrest a man walking in a shopping center during daylight business hours.

The ordinance is unconstitutionally vague in other respects. It gives no guidelines for the application of a definite and uniform standard for determining what "refuses to identify himself and account for his presence" means. Nowhere is there any effort made to tell the officer or the defendant what information must be obtained in order to avoid the charge of vagrancy. In the present case Petitioner gave his true name and accounted for his presence, yet he was arrested apparently because the officer did not find Petitioner's account satisfactory. In *Ricks v. District of Columbia,* 414 F.2d 1097 (D.C. Cir. 1968), fn. 52, the court said the effect of a similar District of Columbia law was to place the

> . . . sole determination in the discretion of the policeman on the beat. The standard of the 'satisfactory account' is not certain, for what may be satisfactory to one may be unsatisfactory to another and the meaning of the word satisfactory itself is not susceptible of any standard of exactness. What kind of satisfactory? Legal or moral satisfaction? What is the time limit to be embraced within the giving of a satisfactory account that will excuse the offender in the sole discretion of the police officer who demands it? A satisfactory account at that instant, or a satis-

> factory account of past activity? If of past activity, is that not guilt without proof? Does the mere fact that one cannot give a satisfactory account of himself to the pleasure of the inquiring officer make him guilty of an unspecified crime? Such unbridled discretion cannot be constitutionally vested in the policeman or the court.

It is submitted that such unbridled discretion to arrest free of guidelines leaves the relationship of the officer to the citizen one of unconcious anomie.

Even the final phrase of the ordinance is constitutionally suspect. The point might be made by asking the rhetorical question: How does a law abiding citizen shopping in Henderson Nevada avoid placing himself in a situation where the "surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification?" Certainly the answer "If a police car passes, don't look at it, keep talking to whomever you are with and, what ever you do, do not walk in the opposite direction or part company" does not suggest itself.

B. By requiring one on request to identify himself and account for his presence the Henderson ordinance violates the Fifth and Fourteenth Amendment rights not to incriminate oneself.

By making refusal "to identify himself and to account for his presence when asked by a police officer to do so" an element of the offense, the Henderson Ordinance makes the exercise of one's Constitutional

right not to incriminate oneself an element of the very crime for which the suspected vagrant is arrested. Needless to say, it cannot be made a crime to exercise one's constitutional right to remain silent.

In *California v. Byers,* 39 U.S.L.W. 4579 (May 17, 1971) the United States Supreme Court, in a plurality opinion with four dissenters, narrowly upheld the constitutionality of California Vehicle Code § 20002(a) (1), which requires the driver of a vehicle involved in an accident to stop and give his name and address to the owners of any damaged property. While there is a superficial similarity between the requirement of the California Vehicle Code and the Henderson Ordinance, the *Byers* case and prior Supreme Court cases actually support the proposition that the Henderson Ordinance is unconstitutional.

In analyzing the constitutional question, it should be kept in mind that "whenever the Court is confronted with the question of a compelled disclosure that has an incriminating potential, the judicial scrutiny is invariably a close one." *Byers,* supra, at 4580. The Court gave three somewhat interrelated reasons why §20002(a) (1) escaped constitutional condemnation:

1. § 20002(a) (1) was not intended to facilitate criminal convictions but to promote the satisfaction of civil liabilities arising from automoble accidents.
2. Like the income tax laws, §20002(a) (1) was not directed at a group inherently suspect of criminal activities, but rather was directed at the public at large.

3. It would be an extravagant extension of the Fifth Amendment to hold that Identification is "testimonial" since disclosure of ones name and address is essentially a neutral act, somewhat akin to blood tests or lineup identification.

One seeks in vain to uphold the Henderson Ordinance on any one of the above grounds. To argue that the Henderson Vagrancy Ordinance is essentially regulatory and designed to promote the satisfaction of the civil liabilities of vagrants would be disingenuous. Nor can it be said that the disclosures are compelled from persons not "inherently suspect of criminal activities". Indeed, since one is not to be stopped and questioned under the ordinance unless "surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification," the testimonial requirement is clearly directed at a "selective group inherently suspect of criminal activities." *Leary v. United States,* 390 U.S. 6 (1969); *Grosso v. United States,* 390 U.S. 62 (1968); *Haynes v. United States,* 390 U.S. 85 (1968); *Marchettii v. United States,* 390 U.S. 39, 57 (1968).

Finally, assuming *arguendo* that disclosing ones name and address is not "testimonial", the Henderson Ordinance requires that the citizen go much further and, presumably in a narrative, "account for his presence". Even the plurality justices in *Byers* recognized that any requirement beyond identification would contravine previous statements of the Court, *Byers,* 4582 at fn. 6. It would seem clear that

if an account of one's presence would reveal the commission of or intent to commit crime, as the officer must suspect before questioning under the Ordinance, then to compel such an account on pain of criminal sanction is the paradigm of compulsory self-incrimination.

C. Even if the Henderson Ordinance is not constitutionally infirm, the arrest of Petitioner under the Ordinance violated his Fourth Amendment right to be free from unreasonable searches and seizures.

Before an officer is warranted in arresting a suspect under this Ordinance, the officer must have probable cause to believe that:

1) the suspect is loitering or wandering from place to place without apparent reason or business;
2) the suspect must refuse to identify himself *and* refuse to account for his presence when so requested by the officer; and
3) the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification.

None of the above three requisites were established by Officer Lattin prior to the arrest of Petitioner.

Petitioner was not wandering or loitering with no apparent reason or business. He was in a shopping center during daytime business hours. Unless every other shopper in the center could be considered wan-

dering or loitering without apparent reason or business, there were clearly no grounds to arrest Petitioner. This is not a situation such as existed in *People v. Caylor,* 6 Cal. App. 3d 51, 85 Cal. Rptr. 497 (1970) (construing a similar California Disorderly Conduct Statute) where the suspect was in a residential area at 11:30 P.M., or as existed in *People v. Weger,* 251 Cal. App. 2d 584, 59 Cal. Rptr. 661 (1967) where the suspect was abroad at 2:30 in the morning.

Even when questioned, Petitioner did not refuse to identify himself. He gave the officer his true age and name. The officer ran a name check on him turning up nothing. The officer candidly admitted he had no reason other than his "suspicious nature" (RT 205) to believe the name and birth date were false. This admission completely negates probable cause for the existence of one of the elements of the offence.

Petitioner accounted for his presence by telling Officer Lattin that he stayed with some friends in Las Vegas for a few days and he was on his way to Michigan. The officer had not reason to doubt the fact that Petitioner was going to Michigan, and Petitioner's statements were in no way contradictory. Henderson is only eight miles from Las Vegas. Although Henderson is the lesser of the two, both cities are gambling and entertainment meccas relying to a large extent, if not primarily, on out of state, transient business. The nature and proximity of the cities belies any contention that someone bound for

Michigan might not find himself temporarily in Henderson and without a wallet to boot. He was arrested only because he could not give the exact number of days he had spent in Las Vegas and because he could not give the name and address of his friends there. Neither of these facts would seem unusual for one in transit from one state to another. In addition, it would seem unreasonable to arrest someone for failure to account for his *presence* on the grounds that he did not know how many days he had been *somewhere else.*

There was nothing to indicate that public safety demanded Petitioner's identification. There is no evidence that this shopping center was an area of high incidence of crime, nor, as in *People v. Caylor, supra,* had there been any reports of recent crimes or suspicious prowlers. The only indication that there was anything differentiating Petitioner from his fellow shoppers was that Officer Lattin testified Petitioner and his companion "appeared to look at my police unit" and then walked the other way, subsequently parting company. Certainly every day there must be many shoppers in the center who look at the unit and walk in the opposite direction. Are they all potentially subject to arrest for this innocuous conduct?

In invalidating a search, the Supreme Court of California identified the vice in permitting a police officer to impute a sinister motive to an otherwise innocent act.

> The difficulty is that from the viewpoint of the *observer,* an innocent gesture can often be mis-

taken for a guilty movement. He must not only perceive the gesture accurately, he must also interpret it in accordance with the actor's true intent. But if words are not infrequently ambiguous, gestures are even more so. Many are wholly nonspecific, and can be assigned a meaning only in their context. Yet the observer might view that context quite otherwise from the actor; not only is his vantage point different, he may even have approached the scene with a preconceived notion—consciously or subconsciously—of what gestures he expected to see and what he expected them to mean. The potential for misunderstanding in such a situation is obvious.

It is because of this danger that the law requires more than a mere "furtive gesture" to constitute probable cause to search or to arrest. The United States Supreme Court recently reaffirmed this rule in the case of *Sibron v. New York,* 392 U.S. 40, 66-67, 88 S. Ct. 1889, 1904, 20 L. Ed. 2d 917: 'deliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of *mens rea,* and *when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime,* they are proper factors to be considered in the decision to make an arrest.' (Italics added.) . . . 'As it is the information known to the police officers or the suspicious circumstances which turn an ordinary gesture into a furtive one, it is equally clear in this state that in the absence of information or other suspicious circumstances, a furtive gesture alone is not sufficient . . .' *People v. Superior Court of Yolo County,* 3 C.3d 807, 818, 91 Cal. Rptr. 729, 735, 478 P.2d 449, 455 (1970).

Since Officer Lattin had no evidence connecting Petitioner with any crime, and even a name check uncovered nothing, there was insufficient cause for this arrest. Officer Lattin candidly admitted he had preconceived notions—his "suspicious nature" (RT 205). Until we are prepared to condone the "roust" or return to the pre-Constitution evils of the general warrant, any arrest on grounds as tenuous as those in this case must be unconstitutional.

D. It cannot be said beyond a reasonable doubt that introduction of the illegally obtained evidence that petitioner was armed when arrested had no impact on the jury's determination of guilt; therefore this error was prejudicial.

The California District Court of Appeals affirmed this conviction on the grounds that any error was harmless within the meaning of *Chapman v. California,* 386 U.S. 18 (1967). This was clearly error.

Although the Petitioner was found guilty of second degree murder, the jury was given five possible verdicts: (1) first degree murder; (2) second degree murder; (3) voluntary manslaughter; (4) involuntary manslaughter; (5) not guilty. Since there was no question that there was a struggle and that the gun which killed the deceased was first in the possession of the deceased's husband, the jury was instructed extensively on doctrines of self-defense, justifiable homicide, and the law regarding the extent to which a landowner may use force to eject a trespasser. In fact, there was a substantial question at trial whether Petitioner had the alleged murder weapon in his pos-

session at the time the fatal shot was fired. Other than the Petitioner, the only living witnesses to the altercation were Mr. Parsons (the deceased's husband), Mr. Buckley, Mr. Mercer, and Mr. Chaney. Except for Mr. Buckley, all testified essentially that Mrs. Parsons handed Mr. Parsons the gun, he pointed it at Petitioner, there was a struggle over the gun during which Mrs. Parsons (who weighed 380 pounds (RT 187)) was throwing things at Petitioner. Mr. Buckley testified that Mrs. Parsons hit Petitioner with a postage-stamp dispenser (RT 104). Mr. Parsons even testified that the first shot was fired while he still had the gun.

The only person to testify that Petitioner actually shot Mrs. Parsons was Mr. Buckley, and his testimony is exceptionally weak. First he testified that he could not say who had the gun (RT 73). He was then confronted with a statement that he allegedly gave to the police in which he said "the next thing he [Buckley] knew what that Lloyd [Petitioner] had the gun and first of all shot the manager's wife, and then the manager". The trial recessed and when it reconvened, Buckley changed his story and testified that Petitioner had the gun in his hand (RT 125). Keeping in mind that Buckley had originally been charged with murder and could possibly have been charged with attempted larceney from the cash register, and keeping in mind that the statement allegedly given to the police was given while Mr. Buckley was intoxicated, bleeding (he had been shot by Mr. Parsons) and in pain, this evidence is weak indeed. If we add the fact that Mr. Parsons testified that the shooting occurred in the reverse order (Mr. Parsons was shot before Mrs. Parsons), it is quite likely that Mr. Buckley's testimony in this regard could have been rejected by the jury.

Given the evidence as it stood, a jury would have been reasonable in coming in with a verdict of voluntary or involuntary manslaughter, or not guilty. With all deference to the California District Court of Appeals, to say that the circumstances of Petitioner's arrest and the fact that he was armed when arrested could have no impact on the verdict would be naive. Since Petitioner was armed with the fatal weapon, it shows conclusively that at least at some time he got exclusive control of the gun. This would tend to corroborate Mr. Buckley's second version of what he saw, and would naturally tend to raise the degree of the crime. Also the fact that Petitioner was armed in a shopping center would create in the minds of the jurors the impression that the Petitioner is an evil, desperate man of violence. Indeed, the very fact that Petitioner was arrested in Henderson on the following day was used by the prosecution to show consciousness of guilt through flight. The fact that Petitioner gave his true name when confronted by the police, then after his arrest changed his name (RT 222) could be used for the same purpose.

Needless to say, flight plus possession of the fatal weapon is *substantial,* not trivial, evidence of guilt. It goes without saying that any trial lawyer would fight vigorously to keep out of evidence the fact that his client charged with murder by gunshot was armed with the fatal weapon when arrested. It is equally

clear that an experienced prosecutor would as vigorously try to get such a fact before the jury. Indeed, in spite of the potential invalidity of the arrest, the prosecutor in this case risked reversal in order to introduce the gun and Officer Lattin's testimony. Experienced trial counsel do not invite reversal in order to engage in idle acts. There is probably no better indication of the probative nature of this evidence than the fact that at trial the prosecutor expended such effort and took such risks to introduce it. Officer Lattin was brought all the way from Henderson to testify, and his testimony before the jury took ten pages (RT 214-224). Mr. Davidson, a ballistics expert, was called to testify that the fatal gun and the one taken from Petitioner were the same (RT 235). The prosecution's own conduct with respect to this evidence belies any contention that beyond a reasonable doubt this error did not contribute in any way to Petitioner's conviction. *Chapman v. California,* 386 U.S. 18 (1967).

Conclusion

For the reasons that the Henderson Ordinance is unconstitutional, the arrest was without probable cause, the subsequent search was illegal, and the introduction into evidence of the gun and circumstances surrounding the arrest was prejudicial, Petitioner submits that his detention is illegal and an Order should issue requiring that Petitioner either be retried within 60 days or be released.

Respectfully submitted,
Robert W. Peterson
Attorney for Petitioner

United States District Court
for the Northern District of California

[Filed Nov. 2, 1971]

[Caption omitted in printing]

ORDER TO SHOW CAUSE

Based upon the petition filed herein and good cause appearing:

It Is Hereby Ordered that Respondent(s) file a return with this Court on or before the 12th day of November, 1971, to show cause, if any there be, why a writ of habeas corpus should not be issued herein;

It Is Further Hereby Ordered that the Clerk of this Court forthwith serve a copy of this Order upon Respondent(s) as well as upon Petitioner and a copy of the petition and of this Order upon official counsel for Respondent(s) and that Respondent(s) serve a copy of the return upon Petitioner prior to the filing thereof;

It Is Further Hereby Ordered that if Petitioner files a traverse to the return, Petitioner shall do so prior to the date next below specified; and

It Is Further Ordered that Respondent(s) or counsel for Respondent(s) appear in person before this Court on the 3rd day of December, 1971, to complete compliance with this Order to Show Cause.

Dated: November 1, 1971

Lloyd H. Burke
United States District Judge

United States District Court
Northern District of California

[Filed Jan. 14, 1972]

[Caption omitted in printing]

RETURN TO ORDER TO SHOW CAUSE AND POINTS AND AUTHORITIES IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS

Comes now W. T. Stone, Superintendent of the Correctional Training Facility, Soledad, California, and for a return to the order to show cause issued by this Court on November 1, 1971, and made returnable on or before January 14, 1972, states:

I.

That petitioner is lawfully in custody of respondent W. T. Stone pursuant to a valid judgment and commitment. On June 6, 1968, following a jury trial on his plea of not guilty in the Superior Court of San Bernardino County, he was found guilty of violation of California Penal Code section 187 (second degree murder). On June 10, 1968, he was sentenced to state prison for the term provided by law. On October 7, 1969, the judgment of conviction was affirmed by Division Two of the California Court of Appeal for the Fourth Appellate District (*People v. Powell,* 4 Crim. 3388, Unpublished Opinion). A petition to the California Supreme Court for a writ of habeas corpus was denied on July 1, 1970.

II.

On July 15, 1970, petitioner filed a petition in forma pauperis for a writ of habeas corpus in the United States District Court for the Northern District of California (No. C-70-1497 GSL). On September 17, 1970, the court entered an order denying this petition. An appeal from this order was dismissed by the Court of Appeals for the Ninth Circuit on July 15, 1971 (Ninth Circuit No. 26782). Petitioner was given leave by the court to file an amended habeas corpus petition with this Court. The present petition was filed on August 24, 1971.

III.

The exclusionary rule is inapplicable to the present case.

IV.

The Henderson, Nevada Vagrancy Ordinance is not unconstitutionally vague.

V.

The arresting officer had probable cause to believe that petitioner had violated the ordinance.

VI.

Even if the evidence was erroneously admitted, such error was harmless beyond a reasonable doubt.

Wherefore, it is respectfully submitted that the order to show cause heretofore issued be discharged, that the petition for writ of habeas corpus be denied and that the proceedings be dismissed.

Dated:

Evelle J. Younger,
Attorney General of the State of California

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS

Statement of Facts

On the evening of February 17-18, 1968, Gerald Parsons and his wife Mary were working at the Bonanza Liquor Store in San Bernardino. At approximately midnight, Mr. Parsons was seated in the rear office of the store while his wife was seated near the counter in the sales area of the store (RT 8-9)[1] Mr. Parsons heard the bell under the entrance mat ring, Through a one-way glass, he saw four male Negroes enter his store. Petitioner, one of these men, removed a bottle of wine from a shelf, put it inside his jacket, and closed the jacket. Parsons left the back room and approached him. He said, "What about the wine?" Petitioner replied, "What wine?" Mrs. Parsons replied, "That wine under your jacket." Petitioner responded that he had no wine. Parsons then opened petitioner's jacket, exposing a half-gallon bottle of wine. Petitioner then struck Parsons in the mouth with his fist (RT 10-12, 29, 32).

The other men then started to walk out of the store. Parsons asked his wife to hand him a .38 caliber revolver which they kept near the cash register. She handed it to him. Parsons then noticed that petitioner had left the store (RT 12-13). However, petitioner reentered the store a short time later. Parsons pointed the gun at him as he continued advancing toward him.

[1]"RT" refers to the Reporter's Transcript of petitioner's trial.

He then cocked the gun, raised it and fired a shot into the ceiling. Parsons then turned and placed the gun near an ice cream freezer. Petitioner passed him and seized the gun. Parsons then heard an explosion, felt a bullet strike him in the wrist, and became aware that he was bleeding (RT 16-17).

Parsons then ran for another gun which he kept in the office. At that time, he did not know where his wife was. He heard a shot and heard her scream. At the trial, Parsons was unable to remember exactly where he was when he heard the shot and heard his wife scream. He also heard the cash register bell ring. He returned from the office holding the second gun and observed Fred Buckley, one of the four men, leaning over the cash register. He fired a shot at Buckley, who immediately ran out the door (RT 18-19). He then observed that his wife had been shot. Parsons last saw the first gun he handled in petitioner's hand after he (Mr. Parsons) had placed it behind the ice cream freezer. He saw no one else handle the gun (RT 24).

Fred Buckley testified that he observed petitioner strike Parsons and saw Parsons obtain a gun from his wife. Parsons pointed the gun at petitioner, who grabbed Parsons' arm. The gun then discharged. Petitioner knocked the gun from Parsons' hand (RT 68-72). Buckley then saw petitioner holding the gun and heard a shot fired. He observed Mrs. Parsons fall to the floor. He heard the gun discharge again and saw that Mr. Parsons had been shot in the arm (RT 85-86). Buckley was then shot in the arm while he was standing near the cash register (RT 87).

San Bernardino Police Officer Donald Covey took a statement from Buckley at the San Bernardino City Hall. Buckley stated that petitioner had a bottle of wine hidden under his coat, that the manager spotted it, and that petitioner then gained possession of the gun and "shot the manager's wife and, then, the manager" (RT 161-162).

Lester Mercer, another of petitioner's companions, testified that when Mr. Parsons "went to wave the gun" he (Mercer) got upset and "flew out of there" (RT 141). Mercer observed that petitioner had something under his jacket (RT 134, 143). Although he heard a shot fired, Mercer did not see anyone get shot (RT 151). At the time he left, Mrs. Parsons was still behind the counter (RT 156).

John Chaney, another of petitioner's companions, testified that as Parsons grabbed petitioner's coat "the wine fell to the floor and bust" (RT 164-166). Chaney stated that the bottle was a fifth and that petitioner then shoved Mr. Parsons, that Mrs. Parsons then handed a gun to him. Chaney tried to pay for the wine "when the scuffle started". The gun discharged during the scuffle and Chaney ran from the store. Petitioner had grabbed the gun and was holding it when Chaney last saw it (RT 166-169).

San Bernardino Police Officer Bradford Hilder arrived at the Bonanza Liquor Store at 12:15 a.m., February 18, 1968, and observed no broken wine bottles. He did, however, observe a full wine bottle outside the store (RT 225-228). The bottle was a half

gallon of Gallo Wine with the seal intact (RT 260-261, 266). Fingerprints found on the bottle were of no value due to smudging (RT 265-266).

On the morning of February 18, 1968, during the post-mortem examination of the body of Mary Parsons, a lead slug was removed from the lung of the body. There was a high degree of similarity of individual striation markings observed during tests between the slug and bullets fired from the gun later found on petitioner's person. This similarity led John Davidson, a criminalist for the San Bernardino County Sheriff's Office who was called as an expert witness for the prosecution, to conclude that the bullets were fired from the same weapon (RT 235-240).

At approximately 10:10 a.m. on February 18, 1968, Officer Edward Lattin of the Henderson, Nevada Police Department was on routine patrol in a marked police unit near the parking lot of a shopping center in the City of Henderson. He observed two men, one of whom was petitioner, look at his police unit and then quickly turn and walk in the opposite direction (RT 194-195). The men looked back toward the police vehicle several times and continued walking rapidly. The officer made a U-turn and approached them. They then split apart and began walking in opposite directions. The officer approached petitioner from the rear and honked his horn. Petitioner continued to walk toward the rear of a department store. The officer stopped his vehicle, jumped out, and asked petitioner to halt. Petitioner then halted and turned around (RT 196-197).

The officer asked petitioner whether he had any identification. Petitioner replied that he did not since his identification papers had been stolen. In response to further questions, petitioner gave his name as Lloyd Charles Powell and his date of birth as January 6, 1947. The officer checked this name through the Henderson Police Department with negative results. Petitioner stated that he had been staying with friends in Las Vegas but was unable to give the name of these friends or the street on which they lived (RT 197-198). He said that he had been in Las Vegas "for the past few days" (RT 207). He also stated that he was en route to Michigan at that time (RT 199). The officer testified that Henderson was 8 miles south of Las Vegas and that a person going to Michigan from Las Vegas would proceed east and would not pass through Henderson (RT 202, 208-209).

The officer then arrested petitioner for violation of the Henderson vagrancy ordinance (RT 199). After the arrest, the officer searched petitioner's person and found a pistol with 6 expended cartridges in the cylinder. The pistol was found in the pocket of petitioner's coat (RT 209-210).

Argument

I.

The Exclusionary Rule Is Inapplicable to the Present Case.

We note initially that no valid policy would be served at this time by holding the ordinance in question to be unconstitutional. Petitioner was arrested

for violation of the ordinance and a search was conducted pursuant to that arrest. It does not appear that he was prosecuted for violation of the ordinance. He now contends that the fruits of a search incident to that arrest should have been suppressed. The purpose of the exclusionary rule is to discourage illegal police conduct. *Mapp v. Ohio,* 367 U.S. 643, 656 (1961). That purpose will not be advanced by ex post facto condemnation of an arrest, apparently valid when made. *Pierson v. Ray,* 386 U.S. 547 (1967), was an action brought under the Civil Rights Act of 1871 (42 U.S.C. § 1983). Some of the defendants, police officers, had arrested the plaintiffs under a Mississippi statute later declared unconstitutional by the Supreme Court. The court held that they could not be liable in damages for acting under a statute that they reasonably believed was valid, but which would later be held unconstitutional, since they were not required to predict the future course of constitutional law. Although *Pierson* was, of course, an action against the arresting officer, we submit that its holding is applicable to the present case. See *People v. Carnesi,* 16 Cal.App.3d 863 (1971).

II.

The Henderson, Nevada Vagrancy Ordinance Is Not Unconstitutionally Vague.

Petitioner first contends that the ordinance in question is unconstitutionally vague on its face. We note initially that the Supreme Court of the United States has consistently held that lack of precision itself is

not offensive to the requirements of due process. The court does not require impossible standards. All that is required is that the language of the statute conveys sufficiently definite warning as to the conduct proscribed when measured by common understanding and practices. *Roth v. United States,* 354 U.S. 476, 491 (1957); *United States v. Petrillo,* 332 U.S. 1, 7-8 (1947). A statute must be sufficiently explicit to inform those subject to it what conduct on their part will render them liable to its penalties. *Connally v. General Construction Company,* 269 U.S. 385 (1926). The mere fact that a penal statute is so framed as to require a jury upon occasion to determine a question of reasonableness is not sufficient to make it too vague to afford a practical guide to permissible conduct. *United States v. Ragen,* 314 U.S. 513 (1942).

A statute must not, however, forbid or require the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is not sufficient reason to hold the language of the statute too ambiguous to define a criminal offense. *United States v. Petrillo, supra.* If the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise. And, if this general class of offenses can be made constitutionally definite by a reasonable construction of the statute,

this Court is under a duty to give the statute that construction. *United States v. Harriss,* 347 U.S. 612, 618 (1954). The Supreme Court of the United States has expressed its intention to go far to uphold statutes to deal with offenses difficult to define when they are not intertwined with limitations on free expression. Only a definite conviction that the Fourteenth Amendment has been violated justifies reversal of a decision by a court primarily charged with responsibility to protect persons from conviction under a vague state statute. *Winters v. New York,* 333 U.S. 507 (1948); see also *Alabama State Federation of Labor, Local Union v. McAdory,* 325 U.S. 450 (1945); *Porter v. Investors Syndicate,* 286 U.S. 461 (1932). In determining the sufficiency of the notice afforded by a statute, the statute must of necessity be examined in the light of the conduct with which the defendant is charged. *United States v. National Dairy Products Corp.,* 372 U.S. 29 (1963).

It is therefore significant to note that in a recent case presented to the Supreme Court concerning a vagrancy statute, the court failed to strike down the statute as void on its face, but held only that the conduct of the petitioner did not fall within the compass of the statute. *Palmer v. City of Euclid,* 402 U.S. 544 (1971); *cf. Coates v. City of Cincinnati,* 402 U.S. 611 (1971) (statute making it a criminal offense for a person to "conduct themselves in a manner annoying to persons passing by" held unconstitutional on its face since no standard of conduct was specified). In *Palmer, supra,* the statute in question provided that:

"any person who wanders about the streets . . . or who is found abroad at late or unusual hours in the night without any visible or lawful business and who does not give satisfactory account of himself" is subject to criminal penalties. The court reversed Palmer's conviction because, as applied to Palmer, the ordinance failed to give "a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." In that case, police officers had observed Palmer's car in a parking lot. A woman left the car and entered an adjoining apartment house by the front door. Palmer then pulled onto the street, parked with his lights on and used a two-way radio. When approached by the officers, he told them that he had just let off a friend. He was then arrested. At the police station, he gave three different addresses for himself and said that he did not know his friend's name or where she was going when she left the car. The court held that Palmer could reasonably be charged with knowing that he was on the streets at a late or unusual hour and that his explanation of his conduct was unsatisfactory. However, the ordinance gave him insufficient notice that his actions were sufficient to show him to be "without visible or lawful business".

We submit that the ordinance in question in the present case is not unconstitutionally vague and uncertain. In *People v. Weger,* 251 Cal.App.2d 584 (1967), *cert. denied,* 389 U.S. 1047, the California Court of Appeal undertook a thorough examination of a California statute similar to the Henderson ordi-

nance and concluded that it was constitutional.[2] The court thoroughly considered the question of whether the terms "without apparent reason or business" and "refuses to identify himself and to account for his presence" were unconstitutionally vague and found that these terms conveyed sufficiently definite warning as to the type of conduct proscribed when measured by common understanding and practices. For the reasons set forth in that opinion (*Id.* at 588-599), we submit that the terms complained of are not unconstitutionally vague.

It further appears that *Ricks v. District of Columbia,* 414 F.2d 1097 (D.C. Cir. 1968), cited by petitioner, is inapplicable to the present case. There the statute in question, which provided that a suspected person must give a "satisfactory account" was held to be unconstitutionally vague since it furnished no guidance as to what constituted a "satisfactory account". In the ordinance in question in the present case, such an "account" is necessary only when "the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification." Furthermore, the question of whether or not a particular account is "satisfactory" similarly appears to be a question for the courts and not for the discretion of the arresting officer. In *Palmer, supra,* the Supreme Court did not question the validity of a similar provision in the ordinance there in

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[2]Other California cases affirming the constitutionality of this statute are *People v. Caylor,* 6 Cal.App.3d 51 (1970); and *People v. Bruno,* 211 Cal.App.2d Supp. 855 (1962); see also *In re Cregler,* 56 Cal.2d 308 (1961).

question. The court held only that, as applied to Palmer's "account" of his presence, the ordinance was not unconstitutionally vague.

Petitioner further contends that the ordinance's requirement that the suspected person must "identify himself" and "account for his presence" is violative of the suspect's constitutional right to remain silent. The court in *Weger, supra,* found that the statute could not be construed as requiring the person interrogated to be a witness against himself. His silence would be mere nonassertive conduct. *Id.* at 599-602. The normal questions asked in such a situation would not be designed to elicit incriminating statements, but would give the suspect an opportunity to explain his presence and actions.

Similarly, in *Terry v. Ohio,* 392 U.S. 1 (1968), the court upheld the right of the police in appropriate circumstances to approach in an appropriate manner a person for purposes of investigating possibly criminal behavior, even though the police did not have probable cause to make an arrest. To be a meaningful aid to law enforcement, this right of investigation must, we submit, necessarily include the limited right to question the suspect regarding his identity and to ask him to account for his presence.

III.

The Arresting Officer Had Probable Cause to Believe That Petitioner Had Violated the Ordinance.

The facts relating to the circumstances of petitioner's arrest are detailed in our statement of facts, *supra.* We submit that these facts were sufficient to give Officer Lattin probable cause to arrest him. As noted in *People v. Weger, supra,* the word "loiter" has a certain and generally accepted meaning. The word has been defined to mean "to be slow in moving; delay, linger; saunter; lag behind" or "to linger idly by the way, to idle". *People v. Weger, supra,* at 591, citations omitted.

Here, the actions of petitioner and his companion in aimlessly wandering and changing their direction of travel several times at the approach of a police officer and in attempting to avoid the officer clearly met this definition. The surrounding circumstances were such as would indicate to a reasonable person that the public safety demanded that petitioner identify himself. Similarly, as in *Palmer,* petitioner's statements to the effect that he had been staying with friends in Las Vegas, although he could not name the friends or the street on which they lived, and his statement that he was en route to Michigan, when a person going from Las Vegas to Michigan would not pass through Henderson, could not constitute a satisfactory accounting for his presence.

IV.

Even If the Evidence Was Erroneously Admitted, Such Error Was Harmless Beyond a Reasonable Doubt.

In *Chapman v. California,* 386 U.S. 18 (1967), the Supreme Court held that federal constitutional error may be held harmless if a court is able to declare a belief that it was harmless beyond a reasonable doubt. Here, the California Court of Appeal, applying this test, held that any error with reference to admission of the gun into evidence or the receipt of testimony concerning seizure of the gun was harmless beyond a reasonable doubt.[3] We realize that the California court's conclusion of law in this respect is not binding on this Court. *Fay v. Noia,* 372 U.S. 391, 422 (1963). Nonetheless, we submit that the decision of the California Court of Appeal was correct and that this Court should reach a similar conclusion. Here, the testimony of three eyewitnesses to the incident established that petitioner obtained the murder weapon from Mr. Parsons after a struggle. Buckley saw him shoot Mr. and Mrs. Parsons. Mr. Parsons saw petitioner holding the gun, then heard an explosion and felt that he had been shot. A short time later, he heard a shot and heard his wife scream. He then observed that his wife had been shot. Witness Chaney also saw petitioner in possession of the gun, although Chaney left before Mr. and Mrs. Parsons were shot. The testimony of Lester Mercer also placed petitioner

[3]A copy of the opinion of the Court of Appeal is attached as Exhibit A.

at the scene of the crime. Mercer left the store before petitioner gained possession of the gun.

As the California Court of Appeal noted, the testimony of Officer Lattin regarding petitioner's possession of the gun in Nevada was not required to establish any essential element of the crime charged. His possession of the murder weapon at the scene of the crime, following an altercation with Mr. and Mrs. Parsons, was conclusively proven. Accordingly, we submit that, even if the introduction of the gun or the officer's testimony concerning the seizure of it was error, such error was harmless beyond a reasonable doubt.

Conclusion

For the foregoing reasons, it is respectfully submitted that the petition for writ of habeas corpus be denied, that the order to show cause heretofore issued be discharged and that the proceedings be dismissed.

Evelle J. Younger, Attorney General
of the State of California.

[Exhibit A, a copy of the opinion of the California Court of Appeal is Appendix C to the Petition for Writ of Certiorari in W. T. Stone, Warden v. Lloyd Charles Powell, USSC No. 74-1055, and omitted in printing.]

United States District Court
Northern District of California

[Caption omitted in printing]

[Filed January 26, 1972]

TRAVERSE AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF TRAVERSE

Comes now petitioner Lloyd Charles Powell and through his attorney Robert W. Peterson, by way of traverse to respondent's Return to Order to Show Cause, states as follows:

Petitioner is unconstitutionally deprived of his liberty for reasons set forth in his Petition for Writ of Habeas Corpus, Memorandum of Points and Authorities in Support of Petition for Writ of Habeas Corpus, and Memorandum of Points and Authorities in Support of Traverse. The latter is attached hereto and incorporated by this reference.

Robert W. Peterson,
Attorney for Petitioner

United States District Court
Northern District of California

[Caption omitted in printing]

MEMORANDUM OF POINTS AND AUTHORITIES

I

The Exclusionary Rule Is Applicable To The Present Case.

The Attorney General, relying on *Pierson v. Ray*, 386 U.S. 547 (1967), argues that fruits of an illegal arrest may be introduced into evidence so long as the arrest is authorized by statute, even though the statute is unconstitutional. *Pierson* is not in point because it involved a *damage* action against police officers who made arrests under a statute later declared unconstitutional. The Supreme Court quite properly held that a police officer should not, through an award of damages, be made an insurer of the constitutionality of legislation. It does not follow from *Pierson* that fruits of arrest under unconstitutional statutes may be used with impunity. Indeed, the exclusionary rule was never mentioned by the court.

The purpose of the exclusionary rule is to discourage unconstitutional conduct of state agents by preventing use of the fruits of unconstitutional action. This rationale applies to city councils contemplating adoption of unconstitutional ordinances as well as policemen on the beat contemplating arrests. If the Attorney General's position were adopted, a city

council concerned about drugs could adopt an ordinance permitting search and arrest "in the discretion of the police officer" and, as long as defendants were prosecuted for drug or other offenses, not only could such unconstitutionally obtained evidence be used, but a defendant would have no standing to challenge the constitutionality of the ordinance under which he was arrested. The exclusionary rule is not so feeble as to permit such facile circumvention.

II

The Henderson, Nevada, Ordinance Is Unconstitutional On Its Face And As Applied To Defendant.

The Attorney General distinguishes *Ricks v. District of Columbia,* 414 F.2d 1097, (D.C. Cir. 1968) (phrase "satisfactory account" held unconstitutional as offering no guidance as to its meaning) on the grounds that under Henderson's Ordinance an "account" is required only when "the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification." Clearly, the requirement that an observer must perceive a danger to public safety does nothing to tell the interrogated citizen what constitutes a satisfactory "account".

It is true, as the Attorney General points out, that *Palmer v. City of Euclid,* 402 U.S. 544 (1971) did not hold the phrase "visible or lawful business" unconstitutional on its face. There was no need to do so. The entire court agreed that the phrase was unconstitutional as applied to a fact situation more suggestive

of suspicious activities than those presented in the instant case. It should be noted that two of the Justices volunteered that they would have held the ordinance unconstitutional on its face if the narrower grounds had not been available to the court. In a companion case, the court did hold the phrase "conduct themselves in a manner annoying to persons passing by" unconstitutionally vague on its face. *Coates v. City of Cincinnati,* 402 U.S. 611 (1971). It is submitted that annoyance to others is more definite than the vague standards of the Henderson Ordinance.

While the requirement that "public safety" demand identification and an account for one's presence is an insufficient distinction of the *Ricks* case, *supra,* it clearly places defendant in that suspect group the Supreme Court has held need not identify itself, much less give a narrative account of its activity. That a California Court of Appeals upheld a similar California State Statute on the grounds that failure to "identify" or to "account" would be "mere nonassertive conduct" is beside the point. *People v. Weger,* 251 Cal.App.2d 584 (1967), simply stated, the right not to incriminate oneself is constitutionally protected "nonassertive conduct." In defence of the *Weger* court it should be noted that the *Weger* case was decided prior to the landmark decisions of *Leary v. United States,* 395 U.S. 6 (1969), *Grosso v. United States,* 390 U.S. 85 (1968), *Marchettii v. United States,* 390 U.S. 39 (1968).

It is argued that since *Terry v. Ohio,* 392 U.S. 1 (1968), permits a stop-and-frisk on "reasonable suspicion," the Henderson Ordinance requirement that

Petitioner identify himself and account for his presence is constitutional. It does not follow that because an officer may have a right to make a limited inquiry of a suspect, the officer has a right to an answer. Nothing in *Terry* suggests that it would be constitutional to make a crime out of one's refusal to answer an officer's incriminating questions. Of course, *Miranda v. Arizona,* 384 U.S. 86 (1966), clearly recognized the right to remain silent by requiring the police, under appropriate circumstances, to expressly advise an arrestee of the right. The California Supreme Court is in accord that one's refusal to answer an officer's inquiry may not even be used as a basis for arrest, much less conviction.

> Upon such inquiry the person questioned may elect to give an explanation of his 'furtive' movement or he may freely consent to a search. [cases omitted] He may on the other hand, elect to stand on his constitutional right not to cooperate with the officers in securing evidence against him.
>
> *Gallik v. Superior Court,* 97 Cal.Rptr. 693, 697 (1971).

Not only is the statute unconstitutional because violative of the Fifth and Fourteenth Amendments, but it follows that any statements of Petitioner made under compulsion of criminal sanction must be disregarded in determining the reasonableness of Petitioner's arrest.

Respectfully submitted,
Robert W. Peterson,
Attorney for Petitioner.

[Exhibit 1, the instructions to the jury in Respondent's state trial, omitted in printing.]

[Order and Opinion of United States District Court for Northern District of California in Lloyd Charles Powell v. W. T. Stone, Warden, No. C-70-1497 LHB, filed February 8, 1972, which is printed as Appendix B to the Petition for Writ of Certiorari filed on February 22, 1975, in W. T. Stone, Warden v. Lloyd Charles Powell, USSC No. 74-1055, omitted in printing.]

United States District Court
Northern District of California
[Filed Feb. 22, 1972]

[Caption omitted in printing]

ORDER GRANTING CERTIFICATE OF PROBABLE CAUSE AND LEAVE TO APPEAL *IN FORMA PAUPERIS*

It is hereby ordered that a Certificate of Probable Cause Issue in the above styled action.

It is further ordered that petitioner be permitted to appeal *in forma pauperis* from this Court's Order denying his petition for writ of habeas corpus, entered by this Court on January 28, 1972. 28 U.S.C. §§ 1915, 2253; Fed.R. App. P.22(b).

/s/ Lloyd H. Burke
Lloyd H. Burke
United States District Judge

[Opinion of the United States Court of Appeals for the Ninth Circuit in Lloyd Charles Powell v. W. T. Stone, Warden, No. 72-1543, filed December 4, 1974, which is printed as Appendix A to the Petition for Writ of Certiorari filed on February 22, 1975, in W. T. Stone, Warden v. Lloyd Charles Powell, USSC No. 74-1055, and which is now reported at 507 F.2d 93, omitted in printing.]

United States Court of Appeals
for the Ninth Circuit

[Filed Feb. 20, 1975]

[Caption omitted in printing]

ORDER STAYING ISSUANCE OF MANDATE

Upon application of Thomas A. Brady, Deputy Attorney General counsel for the Appellee, and good cause appearing, IT IS ORDERED that the issuance, under Rule 41 (a) of the Federal Rules of Appellate procedure, of the certified copy of the judgment of this Court in the above cause be and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the Appellee herein, provided such petition is filed in the Clerk's Office of the Supreme Court of the United States on or before February 25, 1975.

In the event the petition for writ of certiorari is granted, then this stay is to continue pending the

final disposition of the case by the Supreme Court of the United States.

/s/ James R. Browning
James R. Browning
United States Circuit Judge

Supreme Court of the United States

ORDER

Filed June 30, 1975

Stone v. Powell

U.S.S.C. No. 74-1055

The motion of the respondent for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. In addition to those questions presented by the petition, counsel are requested to brief and argue the following question:

Whether, in light of the fact that the District Court found that the Henderson, Nevada police officer had probable cause to arrest respondent for violation of an ordinance which at the time of the arrest had not been authoritatively determined to be unconstitutional, respondent's claim that the gun discovered as the result of a search incident to that arrest violated his rights under the Fourth and Fourteenth Amendments to the United States Constitution is one cognizable under 28 U.S.C. § 2254.

Mr. Justice Douglas took no part in the consideration or decision of this motion and petition.